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principle is stated so as to fit the other four cases, *Washington v. Oregon* still is askew because it dealt with fully appropriated waters. When read in light of its facts, it stands for three propositions: (1) under certain circumstances one state can command the entire flow of an interstate stream, (2) evidence of disinterest by a state over time in interstate waters will preclude the possibility of perfecting a claim to those waters, and (3) the lack of diligence on the part of a water user in asserting or maintaining his water rights may preclude a state from asserting them *parens patriae* in an equitable apportionment action.

> B. While priority of appropriation is a consideration, water can be apportioned to junior priorities even if such apportionment injures existing economies and senior priorities. *Kansas v. Colorado*, 206 U.S. 46, 113-114; *Wyoming v. Colorado*, 259 U.S. 419, 484; *Connecticut v. Massachusetts*, 282 U.S. 660; *Nebraska v. Wyoming*, 325 U.S. 621, 642-643.

As stated by Colorado the principle is supported by none of the cases cited. Properly stated, the principle should read: While priority of appropriation is the guiding principle in equitably apportioning interstate waters between prior appropriation states, water can be apportioned to protect an existing economy based on junior appropriations even if such an apportionment would injure senior priorities. Stated this way, the principle is supported by *Kansas v. Colorado*, *Wyoming v. Colorado*, and *Nebraska v. Wyoming*, *supra*. Each involved competition by existing economies on two sides of a state boundary for the water of an interstate stream upon which they were dependent. *Connecticut v. Massachusetts*, *supra*, which involved competing riparian jurisdictions, bears little relation to the principle stated either way.

When the principle is stated properly, it is apparent that the cases cited by Colorado gravely undermine her position. There is no economy dependent on the Vermejo in Colorado. Colorado has created the principle that it recited above to disguise this fact. In the facts of this case, a different principle is important: No state will be allowed to assert a future claim on behalf of one of its citizens on an interstate stream that historically has been fully appropriated in another state. *Nebraska v. Wyoming, supra, Washington v. Oregon, supra, Arizona v. California,* 373 U.S. 546 (1963). These cases not only support the principle we suggest is important here, they so hold.

C. Each state bordering an interstate stream must exercise her rights in an interstate stream reasonably and institute conservation or storage practices to conserve the common supply. *Wyoming v. Colorado,* 259 U.S. 419, 484; *Nebraska v. Wyoming,* 325 U.S. 589, 618.

On the Vermejo there has been no common supply because there has never been a use of Vermejo waters in Colorado. It remains true that each state on an interstate stream must exercise her rights reasonably and conserve the supply. What Colorado does not mention, however, is that states must conserve "within practicable limits . . . ." (*Wyoming v. Colorado, supra* at 484). With respect to storage, each state should regulate and equalize the natural flow also "within limits, financially and physically feasible . . . ." (*Id.* at 484). Both New Mexico and its water users have respectively exercised their water rights continuously and responsibly under conditions of shortage.

D. The law governing disputes between states is not the same as the law which governs the resolution of disputes between private citizens. *Kansas v. Colorado,* 185 U.S. 125, 136; *Connecticut v. Massachusetts,* 282 U.S. 660, 670; *New Jersey v. New York,* 283 U.S. 336, 343.

None of the cases cited supports this statement. If reworded to say that priority of appropriation will not be adhered to strictly in circumstances where a political boundary has allowed conflicting water demands to outdistance the supply, the principle would find support in *Wyoming v. Colorado, Nebraska v. Wyoming, Washington v. Oregon,* and *Arizona v. California, supra.* The western case that Colorado cites, *Kansas v. Colorado,* is inappropriate because Colorado is a prior appropriation jurisdiction and Kansas a riparian jurisdiction.

Colorado miscites *Connecticut v. Massachusetts,* and *New Jersey v. New York, supra,* which stand for the proposition that orthodox riparianism will not be allowed to stand in the way of reasonable diversions. In *New Jersey v. New York,* for instance, the Master proceeded as if a resolution of the controversy would be made easier if common ground could be found. He concluded, in this regard, that each of the three states involved in the litigation permitted municipalities to divert water for domestic needs at the expense of riparian users, that each of the states permitted transwatershed diversion, and that the common law of all three states allowed a reasonable diminution in flow by upstream proprietors. As is amply shown by his report, the Master in fact reached his decision by applying not "the common law of private riparian rights," which the Court deemed obsolete, but by applying the relevant law of water usage common to both states. (Special Master Report, *New Jersey v. New York,* at 37).

The real question here is whether there is any practical need or exigency to vary the application of prior appropriation that was the basis of the federal district court's decision in *Kaiser Steel Corporation et al. v. C.F. & I. Steel Corporation,* Civil No. 76-244 (D.N.M. 1978). The cases stand unequivocably for the proposition that priority is varied only where the social and economic conflict already exists. The Supreme Court has never manufactured the problem it is called upon to resolve in equitable apportionment actions. It is not the Court's job to make sovereigns collide.

E. A state may divert water from an interstate stream even if it has not done so previously. *Connecticut v. Massachusetts*, 282 U.S. 660; *New Jersey v. New York*, 283 U.S. 336.

The holding of both cases cited in support of the principle was that a state may make a new diversion of the waters of an interstate stream only when it will not injure other states sharing the common supply. (282 U.S. at 672; 283 U.S. at 345).

A slightly different principle is more appropriate here: A diversion for future use will not be allowed at the expense of existing rights. *Nebraska v. Wyoming* and *Arizona v. California, supra.* The obvious reason is that no practical need or exigency warranting a future diversion can exist on a fully appropriated stream. Under these circumstances, which prevail in the case at bar, present need for water in a different watershed is totally irrelevant to the equities governing the apportionment of the waters of the stream in question.

F. Priority of appropriation is but one of many considerations in an equitable apportionment proceeding. *Wyoming v. Colorado*, 259 U.S. 419; *Nebraska v. Wyoming*, 325 U.S. 589, 622.

Properly stated, the principle should read: As between priority of appropriation states, priority will always control an apportionment of claims for future uses at the expense of existing uses. *Nebraska v. Wyoming* and *Arizona v. California, supra.* In those circumstances where the social and economic conflict is past fact, Colorado still states the principle incorrectly. There it should read: Priority of appropriation is the guiding principle as between prior appropriation states, but it may be varied by the consideration of relevant factors in order to protect an economy based on junior appropriations. *Accord, Wyoming v. Colorado* and *Nebraska v. Wyoming, supra.* There is no economy in Colorado based upon uses from the Vermejo.

G. Physical conditions of the river, consumptive use, return flows, and other "countervailing equities" or "exigencies" which a state may present must be considered. *Nebraska v. Wyoming*, 325 U.S. 589, 622; *Kansas v. Colorado*, 206 U.S. 46, 113-114; *Connecticut v. Massachusetts*, 282 U.S. 660, 670.

Colorado has stated one principle correctly. However, to suggest that considerations of physical conditions of the river, consumptive use, and return flows are of any use in resolving this dispute is absurd. Those considerations were enumerated in *Nebraska v. Wyoming* as possible bases upon which to reasonably protect junior priorities; that object can be accomplished here simply by applying priority of appropriation, which is eminently fair and equitable under the circumstances. With respect to "countervailing equities" and "exigencies," Colorado can assert none. Her lack of the exercise of sovereign power over the Vermejo, her century long disinterest in the river, and her inaction in asserting any claim to Vermejo waters are strong equities in New Mexico's favor.

CONCLUSION

Colorado's position in this litigation consists of an effort to obtain water from the Vermejo River for future uses by the C.F. & I. Steel Corporation despite the existence of an economy dependent on Vermejo flows in New Mexico. To this end Colorado has sought to minimize the injury that diversions of 4,000 acre-feet per annum would cause to New Mexico's appropriators. Colorado has distorted the facts with respect to the availability of divertible water, the existence of shortage, and the requirements of New Mexico's users.

There is no economic dependence on the Vermejo River in Colorado. There have never been appropriations of Vermejo water to beneficial use in that state. In New Mexico, by contrast,

the evidence has displayed the existence of an economy of ranching, agricultural and mining uses which are wholly dependent on continued flows of the river, the priorities for which extend back to the 1860's. These uses are the foundation for the enterprise and the economic and social reliance which we are asking the Court to protect at equity.

The equity inherent in New Mexico's position is best reflected in the Court's recognition that a state's interest is "indissolubly linked with the rights of the appropriators," *Wyoming v. Colorado,* 259 U.S. 419, 468 (1922), and in the doctrine of prior appropriation as the "guiding principle" of decision. *Nebraska v. Wyoming,* 325 U.S. 589, 618 (1945). Colorado's fear of this principle reflects both on its lack of substantive equities in this lawsuit as well as on the credibility of its evidence. If Colorado believed that sufficient water was present in the Vermejo to satisfy both New Mexico's existing uses as well as C.F. & I.'s proposed diversion, this action would not have been brought. The company would simply have constructed diversion works and proceeded to divert water. C.F. & I. is not precluded from proceeding to appropriate water in accordance with the conditional decree of 1975, only from making diversions before the senior rights of New Mexico's users are satisfied. *Kaiser Steel Corporation et al. v. C.F. & I. Steel Corporation,* Civil No. 76-244 (D.N.M. 1978).

Respectfully submitted,

JEFF BINGAMAN
Attorney General of New Mexico

RICHARD A. SIMMS
JAY F. STEIN
Special Assistant Attorneys General
New Mexico Interstate Stream Commission
Room 101, Bataan Memorial Building
Santa Fe, New Mexico 87503
(505) 827-2325

CERTIFICATE OF SERVICE

I, Jay F. Stein, hereby certify that I am a member of the bar of this Court and counsel of record for the defendants and that on June 5, 1982, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be mailed the requisite number of copies of the foregoing Motion and Reply Brief, by first class mail, postage prepaid, to the following officials of the State of Colorado:

The Honorable Richard D. Lamm
Governor of the State of Colorado
136 State Capitol
Denver, Colorado 80203

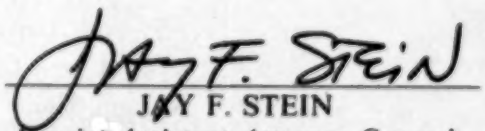
The Honorable J. D. MacFarlane
Attorney General of the State of Colorado
1525 Sherman, 3rd Floor
Denver, Colorado 80203

I certify that on June 5, 1982, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be mailed the requisite number of copies of the foregoing Motion and Reply Brief, by first class mail, postage prepaid, to the following counsel of record:

Mr. Dennis Montgomery
Assistant Attorney General
Attorney General's Office
Natural Resources Section
1525 Sherman Street, 3rd Floor
Denver, Colorado 80203

Mr. Robert F. Welborn
Assistant Attorney General
Welborn, Dufford, Cook & Brown
1100 United Bank Center
Denver, Colorado 80290

I certify that all parties required to be served have been served.



JAY F. STEIN
Special Assistant Attorney General

No. 80, Original

Office - Supreme Court,
FILED
JUN 24 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

THE STATE OF COLORADO,

Plaintiff,

v.

THE STATE OF NEW MEXICO,
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE
OF NEW MEXICO,

Defendants.

OBJECTION TO MOTION FOR LEAVE TO FILE REPLY BRIEF OF THE STATE OF NEW MEXICO

J. D. MacFARLANE
Attorney General of the State of Colorado

RICHARD F. HENNESSEY
Deputy Attorney General

MARY J. MULLARKEY
Solicitor General

WILLIAM A. PADDOCK
Assistant Attorney General

1525 Sherman Street, 3rd Floor
Denver, Colorado 80203

ROBERT F. WELBORN
Special Assistant Attorney General
Welborn, Dufford, Cook & Brown
1100 United Bank Center
Denver, Colorado 80290

June 18, 1982

No. 80, Original

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

THE STATE OF COLORADO,

Plaintiff,

v.

THE STATE OF NEW MEXICO,
AND TONEY ANAYA,
ATTORNEY GENERAL OF THE STATE
OF NEW MEXICO,

Defendants.

OBJECTION TO MOTION FOR LEAVE TO FILE REPLY BRIEF OF THE STATE OF NEW MEXICO

June 18, 1982

The State of Colorado through its Attorney General hereby objects to the Motion For Leave To File Reply Brief of the State of New Mexico. The reasons are as follows:

1. The briefing procedure in regard to exceptions to the Report of the Special Master was set by the order of this Court entered on February 22, 1982 as reported in the letter of the same date from the Clerk of the Court to the Honorable Ewing T. Kerr. That procedure called for exceptions to be filed by either party and for a response by the party opposing the exceptions. The order does not allow for the filing of reply briefs and is in accord with the procedure followed by this Court in prior original proceedings between states. See *Ohio v. Kentucky*, 410 U.S. 641 (1973).

2. This limitation seems designed to promote judicial economy by preventing repetitious argument over legal precedent and the import of the factual record. It recognizes this Court's ability to evaluate the legal and factual arguments with one original brief by a party or parties and one response to each brief. This limitation would require that each party fully set forth in its brief or response all of the legal and factual arguments in support of its position, holding nothing back for further reply.

3. New Mexico seeks to justify its extraordinary motion on the grounds, *inter alia*, that Colorado's Brief presents an erroneous legal theory based on an incomplete discussion of applicable precedent. Colorado submits that this Court is fully capable of analyzing the correctness of Colorado's legal theories.[1]

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[1]The position of New Mexico is also being argued by Amici Curiae in their Brief.

4. New Mexico further argues that Colorado's brief has distorted the factual record with respect to certain matters. However, both Colorado's and New Mexico's briefs are replete with citations to the factual record from which this Court may independently evaluate the factual claims.[2]

5. New Mexico also argues that Colorado's extensive response to New Mexico's brief necessitates a reply so that this Court can fully appreciate the significance of the facts and law at issue in this case. When two sovereign states ask this Court to settle a dispute between them, the significance of the matters at issue is not taken lightly by this Court and New Mexico has no reason to believe otherwise.

6. Finally, New Mexico argues that a decision of this case based on the facts recited in Colorado's brief would be prejudicial to property rights in New Mexico. Colorado believes this Court is fully able to evaluate the conflicting factual claims without an additional brief by New Mexico.

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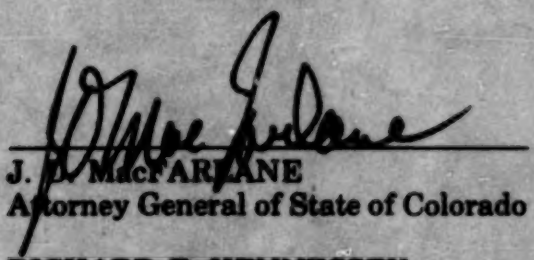
[2]Similar claims could be made of New Mexico's proposed Reply Brief. For example, in the very first paragraph, New Mexico attempts to rehabilitate one of its criticisms and misconstructions of the Special Master's Report by referring to canal loss figures of 35% to 60% for an average of 47½% (bottom of page 2 and top of page 3), citing its own witness' testimony at pages 1280 and 1315 of the transcript. Nowhere on those pages do those figures appear. The only use of the word "system" is at page 1315 and there the testimony is that losses from this system are 25% to 50% for an average of 37½%. Also illustrative is footnote 8 of New Mexico's proposed Reply Brief wherein it says Colorado, at page 75 of the Reply Brief of the State of Colorado, scandalously suggests that New Mexico's farmers were untruthful. No such statement was made nor can it fairly be inferred from Colorado's statement at that page: "Because the Special Master did not base his ruling upon certain portions of the record means only that other portions of the record were deemed more convincing. The Master was in the unique position to judge the credibility of the witnesses, as well as the weight to be given to their testimony. His conclusions are amply supported by the record."

7. The grounds urged by New Mexico in its Motion could justifiably be asserted by Colorado with regard to New Mexico's proposed Reply Brief and would entitle Colorado to file a sur-reply brief.

WHEREFORE, the State of Colorado respectfully requests this Court to adhere to its original order and deny New Mexico's Motion For Leave To File Reply Brief.

Respectfully submitted,



J. D. MacFARLANE
Attorney General of State of Colorado

RICHARD F. HENNESSEY
Deputy Attorney General

MARY J. MULLARKEY
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Assistant Attorney General

1525 Sherman Street, 3rd Floor
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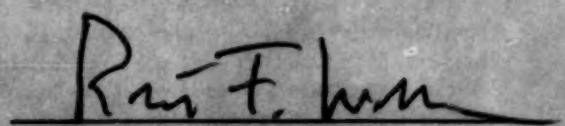


ROBERT F. WELBORN
Special Assistant Attorney General
Welborn, Dufford, Cook & Brown
1100 United Bank Center
Denver, Colorado 80290

CERTIFICATE OF SERVICE

I, Robert F. Welborn, hereby certify that I am a member of the bar of this Court and counsel of record for the plaintiff and that on June 23, 1982, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be mailed the requisite number of copies of the foregoing Objection To Motion For Leave To File Reply Brief of the State of New Mexico, by first class mail, postage prepaid, to the following officials of the State of New Mexico:

The Honorable Bruce King
Governor of the State of New Mexico
State Capitol
Santa Fe, New Mexico 87503

The Honorable Jeff Bingaman
Attorney General of the State of New Mexico
Department of Justice
P. O. Drawer 1508
Santa Fe, New Mexico 87503

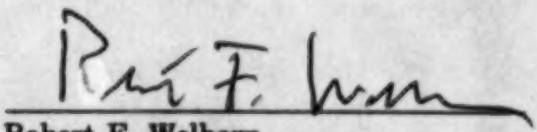
I certify that on June 23, 1982, pursuant to Rule 28 of the Rules of the Supreme Court of the United States, I caused to be served by Federal Express the requisite number of copies of the foregoing Objection To Motion For Leave To File Reply Brief of the State of New Mexico on the following counsel of record:

Richard A. Simms, Esq.
Special Assistant Attorney General
New Mexico Interstate Stream Commission
Bataan Memorial Building
Room 101
Santa Fe, New Mexico 87503

Jay F. Stein, Esq.
Special Assistant Attorney General
New Mexico Interstate Stream Commission
Bataan Memorial Building
Room 101
Santa Fe, New Mexico 87503

Burton M. Apker, Esq.
363 North First Avenue
Phoenix, Arizona 85003

I certify that all parties required to be served have been served.



Robert F. Welborn
Special Assistant Attorney General